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**Legislation****January 28, 1997****COMMENTS OF THE INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE on Draft Strategy Paper "A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE"**

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to comment on the draft strategy paper prepared by the Administration on global electronic commerce issues.

IIPA is a coalition of seven trade associations representing the U.S. copyright-based industries, one of the fastest growing sectors of our economy. In 1993, the most recent years for which figures have been released, the core copyright industries accounted for over \$238 billion in value added to the U.S. economy, and employed nearly 3 million American workers. Since 1984, IIPA members have worked together, and with U.S. government agencies, to improve copyright protection and enforcement worldwide, and to dismantle legal barriers that restrict the access of the U.S. creative industries to foreign markets. One measure of the success of these efforts is the remarkable export record of the copyright industries, which accounted for nearly \$46 billion in foreign sales in 1993.

IIPA applauds the Administration for issuing this draft paper, and commends its authors for its overall tone and approach. The paper identifies many of the key questions on which the U.S. can become actively engaged with our trading partners in working to create the optimal environment for the healthy growth and development of electronic commerce. More importantly, it sketches out the major features of the right answers to those questions. Necessarily, the draft paper paints with a broad brush, but it also identifies (in most areas, at least) the agency or agencies chiefly tasked to fill in these broad outlines with detailed policy proposals and negotiating timetables. It calls for the U.S. to become and to remain actively engaged in international negotiations on these issues, thus embracing a time-tested approach that has worked well to advance U.S. interests. In short, the draft strategy paper marks out the right path for advancing an objective that is crucial for the interests of the U.S. creative industries, and of our economy and society as a whole.

If the thrust of this proposed strategy can be encapsulated in one phrase, it would be "market-oriented." The U.S. has been extraordinarily successful domestically in fostering the production and widespread distribution of information and entertainment products and services of all kinds. Our intellectual property laws give strong incentives to creators, accommodate the legitimate interests of users, and provide the foundation upon which a thriving marketplace in works of authorship has developed. As a result, Americans daily reap an unprecedented harvest of the fruits of creativity. Other societies have chosen other paths -- weaker incentives, more intrusive restrictions on creative content, more extensive regulation of the information infrastructure -- in a word, more interference with market forces. Their results have varied accordingly.

Our traditional information infrastructure produces and efficiently distributes this creative bounty, and the advanced information infrastructure based on digital networks -- today's Internet, and tomorrow's -- promises to do the same. It should do so to the extent that we recognize that all the apparatus and hardware of the information infrastructure is nearly valueless without content: books, journals, databases, music, recordings, business applications, entertainment software, and audio-visual material that the public wants and needs. The thrust of the draft strategy paper seems fully consistent with this recognition. It proceeds from the assumption that the best role for government is to allow willing buyers and sellers of the subject matter of electronic commerce -- such as copyrighted works -- to make and to enforce their own deals. All the initiatives it recommends should be conducive to that goal.

The draft strategy paper also seems to recognize that the global electronic marketplace

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should be an arena of policy continuity as well as of technological change. As we seek to extend the market-oriented approach throughout the global information infrastructure, it would be wasteful, counter-productive, and ultimately self-defeating to tear up the old rule book and write a new one from scratch. The continued success of the U.S. information marketplace, and our extraordinary track record of exports and foreign sales of copyrighted products and services, demonstrate that we are doing something -- most things -- right. The challenge now is not to revise or redraft our basic principles -- intellectual property protection, the sanctity of contract, freedom of expression -- but to extend them into a new and fast-changing arena.

Historically, IIPA has focused its efforts on improving copyright protection and enforcement in overseas markets, and in removing barriers to access to those markets for the U.S. copyright industries. Consequently, the Alliance as a whole does not have fully formulated policy positions on all of the issues identified in the draft strategy paper. We do agree that the proper resolution of all these issues is important to the success and growth of the global electronic marketplace. In what follows we offer our perspectives -- detailed in some areas, much sketchier in others -- on the nine major issues addressed by the draft paper.

## I. CUSTOMS AND TAXATION

IIPA strongly agrees that the Internet should be treated as a duty-free environment. The U.S. and its major trading partners have already taken a first step toward this goal by concluding an Information Technology Agreement (ITA), which foresees the phased elimination of tariffs on many copyrighted products (for example, computer software) when they cross borders in tangible forms. Increasingly, the delivery mechanism for these products will shift away from the movement of physical copies across borders, to the transmission of digital packets over global networks for re-assembly of a copy of a work in the country of destination. The failure to eliminate tariffs on the latter medium would present a conceptual as well as a practical quandary.

However, network delivery will never fully supplant physical delivery of copyrighted product (at least in the foreseeable future). Thus, consistency demands the expansion of the ITA model to the elimination of tariffs on trade in as broad a range of copyrighted materials as possible. The practical case for doing so will become even more compelling in the post-ITA environment, as customs authorities begin to grapple with the problem of determining whether the content of a shipment of imported compact disks consists of dutiable sound recordings or duty-free computer software. Besides the ITA, the Florence Agreement of 1950, eliminating tariffs for imports of educational and scientific materials, provides a useful precedent.

Confiscatory taxation has been a real barrier to access by the U.S. copyright industries, especially the motion picture industry, to a number of overseas markets. Certainly the same unhappy experience could be repeated if foreign governments choose to impose taxes on network delivery of copyrighted materials. IIPA generally supports the thrust of the draft strategy paper's recommendations in this area, but has no detailed comments to offer at this time.

## II. ELECTRONIC PAYMENT SYSTEMS

IIPA agrees that U.S. policy should encourage the development of electronic payment systems, and the removal of any avoidable impediments to their prompt introduction. These systems are essential for the development of an electronic marketplace in goods and services of all kinds.

Electronic payments systems will work in tandem with copyright management systems in order to promote the effective functioning of a global electronic marketplace in copyrighted materials. Copyright management systems offer the potential to dramatically reduce the transactional costs of licensing access to and use of copyrighted materials, and thus constitute a key enabling technology in this environment. As discussed below, the adoption, in the new WIPO treaties, of an international minimum obligation to provide legal protection

for the integrity of rights management information associated with copyrighted material is an important step forward in promoting the growth of copyright management systems.

### III. UNIFORM COMMERCIAL LEGAL FRAMEWORK

IIPA fully agrees that it would be beneficial to harmonize, to the extent possible, the disparate legal rules governing licensing and other contractual agreements carried out over the Internet.

Several Alliance member associations are participating actively in the project to draft a new Article 2B of the Uniform Commercial Code to govern licensing and other transactions in information, a legal arena of considerable importance to the creative industries. This project, originally conceived with a focus on software licensing, has gradually sought to embrace a broad spectrum of transactions such as motion picture and sound recording production deals, author-publisher contracts, and other so-called "upstream" activities that are already well regulated by long-standing contractual, labor relations, and other business practices. How, if at all, Article 2B should deal with these transactions must be more clearly defined to avoid unnecessary disruption of well-established business practices before this important project can be brought to a successful conclusion. IIPA member associations will be keeping similar considerations in mind as they study the UNCITRAL Model Law on Electronic Commerce, and similar efforts on the international level.

IIPA strongly agrees with the draft strategy paper's statement that "participants in the marketplace ... should define and articulate most of the rules that will govern electronic commerce." Any commercial law harmonization that is achieved should maximize contractual freedom to the greatest possible extent, in order to encourage a wide range of licensing practices that will enable the broadest possible distribution of copyrighted materials. Contractual freedom should extend to the ability of the parties in an international transaction to designate the national jurisdiction whose substantive legal rules will govern enforcement of the license or other contract. The U.S. government offered a useful proposal on this subject in the WIPO negotiations leading up to the Performances and Phonograms Treaty, which would also have specified a default rule (the law of the country "most closely connected to the contract") in case the parties did not choose the applicable law. This proposal, while ultimately jettisoned in Geneva, provides a good starting point for U.S. efforts to harmonize the currently conflicting "choice of law" rules applicable to international transactions in copyrighted materials.

Finally, IIPA agrees that "achiev[ing] substantial certainty regarding ... exposure to liability for any damage or injury" would benefit all participants in global electronic commerce. Expectations for attaining this certainty need to remain realistic, however. Some doctrines governing liability are by their nature difficult to reduce to hard-and-fast rules. The fair use doctrine under U.S. copyright law, for instance, depends on a case-by-case, fact-based analysis of a number of issues before it can be reliably determined whether or not a given unauthorized use of a copyrighted work will give rise to liability. The flexibility and adaptability of the fair use doctrine are positive features for participants in electronic commerce, but the unavoidable trade-off for these benefits is a sometimes discouraging degree of uncertainty. National governments remain -- and, in IIPA's view, should remain -- free to fashion liability rules within the broad parameters set by international agreements (including copyright treaties).

### IV. INTELLECTUAL PROPERTY PROTECTION

Of all the policy issues raised by the advent of global electronic commerce, none is more important than the protection of intellectual property. Most of the value of the Internet to its users turns directly upon the content that moves across this network of networks. Virtually all the rest of the Internet's value derives from the software tools that enable it to function. Intellectual property protection is the most effective incentive for the creation and widespread distribution of valuable content, and for the development and dissemination of useful software tools. To the extent that those incentives are weakened or undercut, the spectrum of information and entertainment products and services made available over digital

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networks, and the functionality of the networks themselves to end users, will shrink to the lower end of the value chain, or perhaps disappear altogether.

Internet-based piracy is a growing concern. Today, it directly impacts the book, database, journal and music publishing industries, as well as the software, videogame, and sound recording industries; its effects on the audio-visual industry are clearly foreseeable in the very near future, as technology opens up bandwidth bottlenecks that today constrain piratical activity. Piracy carried out over digital networks already accounts for a significant portion of the estimated \$20 billion lost by the U.S. creative industries to piracy each year; it has the potential to dwarf that figure. If piracy over digital networks is allowed to flourish unchecked, the full potential of global electronic commerce cannot possibly be achieved.

While technological measures to combat piracy are essential -- as is public education about copyright, especially targeted to network users -- the draft strategy paper is absolutely correct when it points out that these steps are not sufficient. Strong legal protections must be adopted, and more importantly, must be vigorously enforced, if sufficient intellectual property incentives are to be preserved. In the inherently global marketplace provided by the Internet, those protections must be enshrined at the international treaty level.

The two treaties adopted by the WIPO Diplomatic Conference in Geneva last month are an important step forward in this regard. While they will have little impact on U.S. copyright law, the adoption of the WIPO Copyright Treaty and of the WIPO Performances and Phonogram Treaty will give a big boost to efforts to raise minimum standards of copyright protection around the world. They will have a particularly positive impact with respect to the incentives for network-based delivery of copyrighted materials, requiring as they do that each signatory country provide in its law for a copyright owner's exclusive right of "making available" its works (or phonograms) to the public for on-demand access. An innovative provision of each treaty obligates signatory countries to provide adequate and effective legal remedies against circumvention of effective technological measures used to ensure the right holders' control over their products. A second new international requirement calls on countries to provide legal protections against certain acts of tampering with rights management information associated with copies of protected works and phonograms. These last two obligations are a first international recognition of the need to protect two key enabling technologies for Internet-based delivery of copyrighted materials. Accordingly, a top priority for U.S. electronic commerce must be to encourage prompt ratification and full implementation of these treaties by as many countries as possible.

The Diplomatic Conference took another positive step when it rejected proposals to require countries signing on to the treaty to enact specific exceptions to the exclusive rights of reproduction, "making available", and/or public communication in order to accommodate the concerns of telecommunications service providers and other specific interests. Instead, the delegates followed the well-established path of allowing individual countries to fashion their own exceptions in national law, so long as those exceptions do not conflict with a normal exploitation of a work or phonogram, or unreasonably prejudice the legitimate interests of right holders (a standard that already applies to exceptions to the reproduction right under the Berne Convention). This outcome allows the U.S. government to decide for itself, on its own timetable, whether any statutory carve-out to benefit telecommunications companies is necessary or advisable, and, if so, how far it should extend within the boundaries set by Berne and re-affirmed in the new treaties. The same is true for any other country that decides to join the new treaties. A second important role for the U.S. government, then, is to monitor developments in national laws closely to ensure that any exceptions which are recognized meet the long-standing Berne criteria which were reaffirmed by the delegates in Geneva. The same analysis would apply to any other legislative exception that may be proposed, including those seeking to expand the current defense of fair use.

A third priority area for U.S. policy in the global electronic commerce arena is to press for full implementation of the enforcement text of the WTO TRIPS Agreement reached in 1994. While the obligations contained in that agreement are not specifically targeted to electronic commerce in copyrighted materials, their fulfillment will certainly be of immeasurable

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assistance to efforts to control copyright piracy on the Internet as well as in more traditional distribution channels. This objective will require persistent and sustained U.S. pressure on many countries. Some developed countries, whose obligation to implement the enforcement text has already matured, are reluctant to expose their copyright enforcement regimes to full international scrutiny. Other countries that would qualify as "developed" under any objective standard seek to evade their responsibilities in this area by claiming the transition period that allows "developing countries" to postpone full TRIPS implementation until 2000: these claims should be rigorously examined and forcefully challenged where necessary. Countries that properly classify themselves as developing should be encouraged to meet this obligation on an accelerated timetable, as some of them have already pledged to do.

Finally, a longer-range international copyright element to the overall U.S. global electronic commerce strategy would include a number of initiatives. The U.S. should be alert for opportunities to accomplish the unfinished business of the WIPO Diplomatic Conference, including clarifying the exclusive rights of phonogram right holders over digital delivery through subscription services, and fashioning a sound international instrument, separate from copyright, to encourage investment in commercially valuable databases. We should seek to move issues involving enforcement of the rights set out in the new treaties, especially those applicable in the digital environment, into the TRIPS framework, where it is more feasible than in the WIPO setting to ensure that countries live up to their enforcement obligations. And we should take appropriate steps to strengthen and specify the general international obligation adopted in Geneva to provide legal protections for technical anti-piracy measures and for the integrity of copyright management systems. This would include adopting, as a minimum international standard, obligations flowing from the anticipated industry consensus on anti-circumvention measures applicable to digital recording in the Digital Video/Versatile Disk (DVD) environment (see discussion below under "Security").

IIPA encourages the Patent and Trademark Office to continue the leadership role on global copyright issues that it has carried out so ably on behalf of the Administration, with the expert collaboration of the Copyright Office in the Library of Congress. Of course, the Office of the U.S. Trade Representative, and other agencies, will continue to play an indispensable role in carrying out this strategy.

## V. PRIVACY

The draft strategy paper accurately characterizes privacy protection as an important value for the success of global electronic commerce, but one which, if not carefully calibrated, may create an unjustifiable obstacle to international trade. The key is to strike the right balance. IIPA generally supports the draft paper's focus on "stimulat[ing] market resolution" of privacy issues, and applauds its commitment to ensuring that our trading partners' privacy regimes -- some of which derive from assumptions and political traditions quite different from our own -- are not used to justify illegitimate impediments to the flow of information across borders. Restrictions imposed in the name of privacy have in the past, and may in the future, disguise discriminations based on less noble motivations, such as protectionism.

Effective copyright management systems are likely to require the collection and processing of considerable quantities of personally identifiable data, in order to sufficiently document, bill, and collect for licensed uses of copyrighted materials by individual consumers. In IIPA's view, this fact in no way prevents these systems from operating with full respect for legitimate privacy interests of individual participants. Technological controls and business practices can be employed to keep data collection and processing to the minimum necessary for the system to carry out its functions, and participants can be adequately informed of the applicable procedures and means for seeking redress in case of abuse. We urge the U.S. government to remain mindful of the potential impact of privacy protections on the efficient operation of this key enabling technology for global electronic commerce in copyrighted materials. Furthermore, privacy must not be allowed to displace accountability; copyright owners must retain the tools necessary to identify and remedy violations of their exclusive rights and of the terms and conditions of licensing agreements.

## VI. SECURITY

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Successful global electronic commerce presupposes the availability of adequate security for materials traveling over digital networks. The networked distribution of musical recordings, audio-visual works, software applications and other copyrighted material requires scrambling, encryption, electronic envelopes, and/or similar technical means for ensuring that access to the materials can be limited to licensed recipients for permitted purposes. These technical measures must also be backed up by legal proscriptions against unauthorized circumvention. The provisions of the recently adopted WIPO treaties include minimum standards for these legal protections and remedies that offer at least a first step toward a harmonized international regime to safeguard the security of copyrighted materials in the networked environment and to combat the piratical traffic in circumvention equipment and services.

For the past two years, representatives of several copyright industry associations have been deeply engaged in discussion on a legislative framework for protecting technical measures aimed at preventing unauthorized digital copying, particularly in the realm of the new Digital Video/Versatile Disk (DVD) technology. The parties are drawing closer to a resolution of these issues that could be a template for a more specific international legal obligation in the field of protection of technical measures. Once achieved and implemented worldwide, this resolution is sure to stimulate the proliferation of digital distribution of copyrighted materials of all kinds. As soon as a cross-industry consensus is achieved, IIPA urges the U.S. to lead efforts to incorporate its contents into appropriate international instruments and into national legislation around the world.

U.S. export control policies have created a serious impediment to construction of the global electronic marketplace in another, closely related area. The inability of U.S. software developers to market strong encryption products and services unfairly disadvantages them in global markets and sidelines U.S. companies seeking to fulfill a fundamental need of many market participants, such as financial institutions and companies on the cutting edge of high-technology research. Export controls on strong encryption must be liberalized to the maximum extent consistent with compelling national security and law enforcement needs, if the global electronic marketplace is to realize its full potential.

#### VII. TELECOMMUNICATIONS INFRASTRUCTURE AND INTEROPERABILITY

IIPA generally supports U.S. efforts to promote liberalization and competition in the provision of telecommunications services. A choice of pathways for network distribution of copyrighted materials to consumers -- in a word, competition -- is sure to lead to lower prices for the communications services upon which electronic commerce depends, and to more consumer access to a wider and more diverse array of content offerings. U.S. policy should seek to ensure that market forces operate to achieve these goals in all countries, and that the architecture of national or regional telecommunications systems is not allowed to become a de facto barrier to international trade.

Copyright industry groups, which have been quite active in the discussion of these issues in Congress and before the FCC, anticipate becoming much more involved in the international aspects of these issues in the near future, for the purpose of ensuring that U.S. policy decisions in this arena fully take into account the interests of content producers and owners.

#### VIII. CONTENT

IIPA fully agrees with the draft strategy paper that "the broadest possible free flow of information across international borders" should be a leading goal of U.S. policy in the global electronic commerce environment. Content restrictions imposed by foreign governments are among the most pervasive and intractable market access barriers faced by the U.S. creative industries. We already know from experience that the advent and proliferation of the Internet will only stimulate redoubled efforts by some countries to tighten control over the information, entertainment, and art of which its citizens are allowed to partake. While some of these restrictions flow from legitimate concerns, others are simply thinly veiled protectionist measures which the U.S. should try hard to dismantle as singularly

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inappropriate in an inherently global economic arena such as electronic commerce. The paper correctly highlights the possibility of regulating new Internet delivery mechanisms under the same rules applicable to traditional broadcasting as a particularly pernicious option, especially in those countries whose broadcasting regulatory regimes are encrusted with local content quotas, rigid and unreasonable foreign ownership restrictions, and other market access barriers that disadvantage U.S. interests.

The tactics proposed in the draft strategy paper for advancing this strategic goal strike IIPA as appropriate and reasonable. They reflect the delicacy (and in some cases the legitimacy) of cultural interests that underlie some of the trade barriers at issue here. To the extent that censorship and similar restrictions cannot be removed, U.S. efforts should be focused on ensuring that they are implemented in a transparent and even-handed manner that does not unfairly prejudice U.S. creators. Delays and costs imposed by such restrictions should also be minimized. In addition, the recent precedent-setting agreement between the United States and Mexico, minimizing the foreign content restrictions on programming provided by Direct-To-Home (DTH) satellites, offers an excellent model for international agreements that will benefit the interests of content providers in all countries by increasing the number of outlets available for their creations.

#### IX. TECHNICAL STANDARDS

IIPA generally endorses both the discussion of the standards issues in the draft strategy paper, and the conclusions reached. Market-driven standards development processes have generally worked well throughout the infancy and childhood of the Internet, and we know of no reason for thinking that they will not also respond to the needs of the global electronic marketplace as it matures. We note that the Information Infrastructure Standards Panel, under the auspices of ANSI, has identified a broad set of the standards necessary to facilitate electronic commerce and is coordinating efforts to develop these. U.S. policy should support these efforts and encourage other governments to do likewise.

In the field of copyright management systems, as in other technologies of importance to global electronic commerce, a number of different models are vying for acceptance in the marketplace. IIPA member associations are actively engaged in industry-led efforts to identify those aspects of copyright management systems where standards may be needed in order to promote competition among these different approaches, and to promote interoperability among them. For example, the Association of American Publishers is leading an international publishing industry initiative to develop a standardized Digital Object Identifier system to facilitate electronic commerce in a variety of business models. The DOI system is expected to be a key component of a number of copyright management and protection systems as they develop. This effort exemplifies a process in which copyright marketplace participants come together to identify and to fulfill standards development needs. At the same time, the motion picture industry is closely monitoring various initiatives aimed at creating standard numbering systems for audiovisual and other creative works, which could facilitate both the collection and distribution of copyright royalties, and enforcement against piracy.

#### CONCLUSION

IIPA commends the authors of this draft strategy paper. Their analyses and recommendations should significantly advance the Administration's efforts to promote the healthy development of global electronic commerce. IIPA and its member associations stand ready to assist.

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